In the present case, therefore, so long as the proceedings are retained in Penang the procedure will be as laid down in the Straits Bankruptcy Rules and if the proceedings are transferred to Kedah the procedure will be governed by the Bankruptcy Enactment and the rules made thereunder.

It now becomes necessary to decide whether a receiving order can be made against a married woman without proof that she has separate property. Mr. Knorpel referred me to the case of *Lim Quee Geok (m.w.)*[2]. In that case Murison C.J. delivered a short oral judgment as follows :—

"I think the words 'if any' (in Section 117 of Ordinance No. 44) mean that it must be proved that the debtor had some assets. I have no such evidence. The petition is therefore refused with costs."

Mr. Knorpel, I think rightly, pointed out that this judgment really went further than the facts of the case warranted, because in that case the debtor gave evidence to the effect that she had no separate property. I have no doubt that where there is positive evidence as there was in *Lim Quee Geok's* case that a married woman has no separate property a receiving order would not be made. This is very different, however, from the proposition that there must be affirmative evidence that the debtor has property before she can be made a bankrupt.

I am inclined to think that where a married woman contracts a debt or takes other steps which result in a judgment being taken against her she has to some extent held herself out as possessing at least some assets and that, therefore, unless there is positive evidence that she has none, a receiving order can be made. Apart from this, however, the Ordinance and Rules lay down precisely what is to be stated and verified in a Petition. It is nowhere laid down that in the case of a married woman the Petition shall allege that she is possessed of separate property. In my opinion, therefore, if the creditor, as he has in this case, has complied with all the rules and presented a Petition in the prescribed form properly verified he is entitled to have his Petition heard. If the debtor then opposes the Petition on the ground that she has no separate property then, if the Court is satisfied that this is so, the Petition will be dismissed.

In this case, if I am satisfied as to service, I shall make receiving and adjudicating orders against the debtor and then consider the question of transfer of the proceedings.

Order accordingly.

Solicitors : *Lim, Lim & Oon.*

T. CHELLIAH v. LAXMAN SINGH & ANOR.

[O.C.J. (Spenser Wilkinson J.) September 13, 1954]

[Penang — Consolidated Civil Suit No. 189 of 1953 & Butterworth Sessions Courts Civil Action No. 6 of 1953]

Bills of Sale Ordinance — Document which is not on the face of it a bill of sale — Court can go behind document to ascertain exact nature of document — Sale of Goods Act, s. 21 — Application of, where buyer has no better title than seller has — Moneylenders Ordinance, 1951, ss. 15 & 16.

The subject matter of this case concerned 2 houses which were of a type considered by custom of this country to be movable property. The plaintiff, who was the owner of the 2 houses, executed a document dated May 26, 1952 purporting to sell them in consideration of $1,000 free from encumbrances to the 1st defendant. The 1st defendant in turn by a similar document dated January 5, 1953 purported to transfer the same houses in consideration of $1,350 free from all encumbrances to the 2nd defendant.

The plaintiff contended that although the document he executed was in form an out and out sale of property, the actual bargain between the parties was a loan transaction. The plaintiff further contended that the second document was void under s. 5(2) of the Bills of Sale Ordinance because at the time it was made the grantor (1st defendant) was not the true owner of the property. Finally the plaintiff contended that the 1st defendant was a moneylender and therefore the contract between him and the 1st defendant was unenforceable because the 1st defendant was unlicensed.

Held: the first document was an actual loan transaction and therefore the second document was void. Insofar as the 2nd defendant was concerned s. 21 of the Sale of Goods Act applied, (**Wok binte Hussain v. Harchand Singh**[1] followed).

Held further: the first document was also unenforceable under the Moneylenders Ordinance and therefore repayment of the amount due in respect of the loan was not a condition which would be imposed upon the plaintiff in obtaining the return of his security, (**Palanisamy Servai v. S. V. Lingham**[3] followed).

Cases referred to :—

(1) *Wok binte Hussain v. Harchand Singh* (1953) M.L.J. 176.

(2) *Burkinshaw v. Nicolls* 3 A.C. 1004.

(3) *Palanisamy Servai v. S. V. Lingham* (1954) M.L.J. 145.

CIVIL SUIT.

Eusoffe Abdoolcader for the plaintiff.

Jag-Jit Singh for the 1st defendant.

R. D. Hume for the 2nd defendant.

Cur. Adv. Vult.

Spenser Wilkinson J. : — The dispute in this case concerned two houses in Butterworth and it was common ground that the houses are of a type which by the custom of this country are movable and not immovable property, and my decision in this case proceeds upon this basis.

The plaintiff, who was the owner of these two houses, by a document dated the 26th May, 1952 purported to sell them in consideration of the sum of $1,000 to the 1st defendant free from encumbrances. It is contended, however, by the plaintiff that although this document is in form an out-and-out sale of the property the actual bargain between the parties was a loan transaction, whereby the 1st defendant lent to the plaintiff a sum of $750 and that upon repayment by the plaintiff to the 1st defendant of the sum of $1,000 being the principal of $750 with $250 agreed interest the 1st defendant would reconvey the property to the plaintiff. The $1,000 was to be repaid by ten instalments of $100 each.

In my opinion it is now well settled law that the Court can go behind the express terms of a document of this kind in order to ascertain whether or not the document is a bill of sale, and on this point I follow the decision of Storr J. in *Wok binte Hussain v. Harchand Singh*[1], and the English cases referred to in the report of that case.

Having heard the evidence in regard to the transaction I saw no reason to disbelieve the plaintiff and his witnesses and I was unable to believe the evidence of the 1st defendant, who was obviously lying on several occasions during the course of his testimony. The evidence of the plaintiff with regard to the transaction with the 1st defendant is corroborated by the witness Karuppiah, who appeared to me to be a witness of truth. I was therefore satisfied on the evidence that the transaction in the present case was, as alleged by the plaintiff, a loan transaction, and I find as a fact that the plaintiff received the sum of $725 from the 1st defendant ($25 having been deducted in respect of the petition writer's costs); that he had agreed to repay a total of $1,000 and that he repaid $200 by two instalments of $100 each.

The result of this finding is that the document of the 26th May, 1952, although on the face of it an out-and-out sale, was in fact a bill of sale given by way of security and is, therefore, void for want of registration under Section 4(1)(a) and also because it is not in the form called for by paragraph (b) of Section 6 of the Bills of Sale Ordinance.

On the 5th January, 1953 the 1st defendant by a document very similar to the one above referred to purported to transfer the same houses in consideration of the sum of $1,350 to the 2nd defendant free from all encumbrances. The plaintiff contends that this document is void under Section 5(2) of the Bills of Sale Ordinance because at the time when it was made the grantor was not the true owner of the property, and he also contends that the document was not effective to pass any title in the property to the 2nd defendant because the 1st defendant had no title to pass, and he relies on the maxim *nemo dat quod non habet.*

The plaintiff goes further than this moreover and alleges that the transfer from the 1st defendant to the 2nd defendant was made in fraud of the plaintiff and that the 2nd defendant had actual notice of the position.

I am quite satisfied that the 1st defendant was well aware that he had no right to sell this property but with regard to the position of the 2nd defendant, some rather difficult questions arise. Mr. Hume on behalf of the 2nd defendant argued that by executing a document which in form was an out-and-out assignment and allowing the 1st defendant to be in possession of this document as between him and third parties the plaintiff was estopped from denying that the sale was other than what the document made it appear to be. In support of this proposition Mr. Hume relied upon Section 115 of the Evidence Ordinance and a passage from *Hailsham* Volume 13, page 494 paragraph 563 and also a passage from *Everest & Strode* on Estoppel based upon the authority of *Burkinshaw v. Nicolls*[2].

Both the passage from *Hailsham* and the case of *Burkinshaw v. Nicolls*[2] deal with negotiable instruments or securities. In my opinion the fallacy of this argument lies in equating a simple document of sale made between two private persons with a negotiable instrument such as a bill of exchange or a security such as a share certificate. Where a person brings into existence a document such as a negotiable instrument any representations of fact therein contained are looked upon as representations to everyone into whose hands the document may come; and when a Company issues share certificates which, though not exactly negotiable instruments, are in their nature documents which frequently pass from person to person in the ordinary course of business any representations of fact therein have been held (as was held in the case of *Burkinshaw v. Nicolls*[2]) to be representations to all persons to whom those certificates *bona fide* passed. In such cases the statements in the documents are held to estop the drawer or the Company as the case may be as against anyone who acts upon the faith of the contents of the document from denying the truth thereof. I do not think, however, that this doctrine has ever been applied to its full extent to ordinary contracts, or even to mercantile contracts. The position with regard to a contract for the sale of goods is governed by Section 21 of the Sale of Goods Act, and I think it is clear that the houses in question

in this action being movable are goods within the definition in the Act.

The material part of Section 21 of that Act reads as follows :—

"21. (1) Subject to the provision of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The kind of conduct which precludes the owner of the goods from denying the seller's authority to sell has been laid down in numerous English authorities, but in all those cases it seems to me that the representation whether by words or by conduct amounted to a representation to the particular person who sought to set up the estoppel. I think Section 115 of the Evidence Ordinance summarises the principles of those cases.

In a suit between the 1st defendant and the 2nd defendant the 1st defendant might perhaps be estopped (though I express no opinion as to this), but there was in this case in my opinion no conduct or words of the plaintiff which intentionally caused or permitted the 2nd defendant to act in a particular way. The 2nd defendant was a purchaser entirely unknown to the plaintiff. In my opinion the principle *caveat emptor* applied to him except in so far as he may have been deliberately misled by the 1st defendant. In *Broom's Legal Maxims,* 10th edition page 546 it is pointed out that in the case where a buyer buys goods from a seller who has no title to sell, the sale gives him no title to the goods as against the owner by reason of the maxims *caveat emptor, nemo dat quod non habet* and *nemo plus juris ad alium transferre potest quam ipse habet.*

If it could have been shown that the plaintiff, knowing that the 1st defendant was about to sell to the 2nd defendant, had stood by and done nothing then I think the principles of the English cases would have been applicable; but without such conduct whether active or passive vis-a-vis the 2nd defendant himself there can in my opinion be no estoppel. To hold that there was an estoppel in the present case would in my opinion be tantamount to extending the law relating to negotiable instruments to ordinary contracts and in my opinion such an extension is not permissible.

This being my view it is not strictly necessary for me to decide whether or not the 2nd defendant had actual notice of the 1st defendant's defect in title; but as this is a question of fact depending upon the evidence I think I ought to express my findings upon it.

There is no direct evidence that the 2nd defendant knew the position and the plaintiff quite properly said in evidence :—

"I have alleged in the Statement of Claim that the transfer to the 2nd Defendant was engineered by Kalimuthu. I have no evidence of this except that the 2nd Defendant is the brother of Kalimuthu and Kalimuthu had ill-feelings against me about the toddy contract."

There was evidence that the plaintiff had made a complaint regarding Kalimuthu both to the Customs authorities and to the Police, and I have no doubt that Kalimuthu and the plaintiff were on bad terms and that Kalimuthu was jealous of the plaintiff for having obtained the toddy contract previously held by himself. It was admitted that Kalimuthu was the 2nd defendant's elder brother. Further, there was this important piece of evidence given by the plaintiff (the importance of which the plaintiff himself, I think, did not appreciate), which I accepted : he stated that on receipt of the notice from the 2nd defendant's Solicitor dated the 31st January, 1953 he went to see the 1st defendant with the balance of $800 still due in respect of the loan and offered to pay this $800 in exchange for a re-transfer of the houses and that the 1st defendant then told him that he had raised money on the same houses from another man viz. Kalimuthu. This admission by the 1st defendant indicates I think very clearly that Kalimuthu had something to do with the houses and when all the circumstances are considered I find it difficult on the evidence to resist the inference that the 2nd defendant knew the whole position.

It is true that the 2nd defendant denied any such knowledge, but whilst he admitted that Kalimuthu was his elder brother it appeared to me that he "did protest too much" when he said he knew nothing of his brother's quarrel over the toddy contract and that he had nothing to do with his brother at all.

Finally there is the statement by the 2nd defendant that he bought these houses because he wanted a place for himself and his family to live in. His explanation of why, if he wanted a place to live in, he should buy houses which he knew were full of tenants did not ring true, and I did not believe him when he said that he was unaware of the notorious difficulty of ejecting tenants in view of the provisions of the Control of Rent Ordinance. I cannot believe that anyone would buy a house to live in unless he had at least a reasonable assurance that he would be able to eject the tenants. I conclude, therefore, that the 2nd defendant had some ulterior motive for buying these particular houses.

On the evidence as whole, therefore, I find that the 2nd defendant was not a *bona fide* purchaser for value without notice.

There remains a further point to be decided as between the plaintiff and the 1st defendant. The plaintiff contends not only that the transaction between him and the 1st defendant is void under the Bills of Sale Ordinance but also that the 1st defendant is a moneylender and therefore by virtue of the provisions of Sections 15 and 16 of the Moneylenders Ordinance, 1951 the contract is unenforceable because the 1st defendant is unlicensed, and there is no such memorandum in writing of the transaction as is called for by Section 16.

The question of whether a person carries on the business of a moneylender has been held to be a question of fact, but in deciding this question of fact regard must be had to the provisions of Section 3 of the Ordinance, which provides that any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

I have held that the transaction between the parties was for a loan of $750 and that the sum of $1,000 was to be repaid. I do not think the fact that the houses in question were transferred as security makes this transaction any the less one in which a sum of money was lent in consideration of a larger sum being repaid. I think therefore that the presumption under Section 3 was raised and it was therefore for the 1st defendant to satisfy me that he was not a moneylender.

Far from satisfying me that he was not a moneylender his evidence went quite a long way towards showing that he was in fact a moneylender. He stated that he was a business man, but admitted that he had never been registered under any registration of businesses law. He is a Police pensioner, whose final salary in the Police in 1932 was $38 per month, yet he admitted to having a sum of $3,000 when he retired. His pension was at first $9.60 a month and is now $33.36 per month and he now possesses landed property to the value of $50,000 or $60,000. Of the many guesses one might make as to how he managed to acquire property of such value first as a Policeman and then as a Police pensioner, perhaps the most charitable is that he acquired it over the years by means of moneylending transactions. That he had been a moneylender in the past there is no doubt — indeed, after considerable pressure in cross-examination he admitted that he had been a moneylender until three years ago. He stated that being illiterate he was unable to carry on moneylending under the more complicated provisions of the new Ordinance which came into force on the 31st March, 1952. I have no doubt that this Ordinance has to a large extent restricted his activities as a moneylender, but I have little doubt that he has been a moneylender for some considerable time and that he was tempted, at least in respect of the transaction in question, to continue his activities as such without complying with the provisions of the new Ordinance. At all events he has failed to rebut the presumption raised by Section 3 and I therefore hold that for the purposes of the present proceedings the 1st defendant was a moneylender and that therefore the contract he made with the plaintiff is unenforceable.

The reason why it is necessary to decide this point is that if the transaction is unenforceable under the Moneylenders Ordinance, as I have held it to be, then, following the decision of the Court of Appeal in *AR. VE. Palanisamy Servai v. S. V. Lingham*[3], repayment of the amount due in respect of the loan is not a condition which will be imposed upon the plaintiff in obtaining the return of his security.

In the event I find in favour of the plaintiff on his claim against both defendants and against the 2nd defendant on his counterclaim. In view of the numerous alternatives in the prayers to the Statement of Claim I will hear further argument as to the form which the formal judgment is to take.

Order accordingly.

Solicitors: *Ong Huck Lim; Jag-Jit Singh; Hogan, Adams & Allan.*

Re K. M. NOORDIN (Petitioner); N. P. NARAYANAN CHETTIAR v. V. VARUSAI RAWTHER

[A.C.J. (Spenser Wilkinson J.) September 16, 1954]

[Penang — Civil Revision No. 2 of 1954]

Landlord and Tenant — Control of Rent Ordinance, 1948, s. 14(1) — Whether order made against tenant enforceable as against sub-tenants under — Powers of revision under ss. 53 & 55 of Courts Ordinance, 1948.

The plaintiff-landlord in this case claimed for possession of premises on the ground that the tenant was in arrears of rent. In default of appearance by tenant, an order as prayed was made against the tenant and all persons claiming through and under him with costs.

The petitioner, alleging himself to be a sub-tenant, applied to the High Court for revision on the ground that he was a lawful sub-tenant and had not been given an opportunity of being heard.

Held: under ss. 53 and 55 of the Courts Ordinance, 1948, powers of revision can be exercised, and therefore, in order to make the subletting unlawful prohibition against subletting must have existed at the time of subletting. As subletting was lawful this case must be remitted to the Magistrate's Court for the sub-tenant to be heard.